

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2014 MSPB 3

Docket No. DC-4324-13-0128-I-1

**Jerry Edward Beck,
Appellant,**

v.

**Department of the Navy,
Agency.**

January 16, 2014

Kevin Byrnes, Esquire, Falls Church, Virginia, for the appellant.

Andrea L. Geiger, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Order.

BACKGROUND

¶2 The appellant, a Navy veteran, was formerly employed by the agency as the GS-13 Deputy Protocol Officer to the Chief of Naval Operations. Initial Appeal File (IAF), Tab 1. On May 19, 2011, he applied for a position as a GS-13 Event Forum Project Chief, which carried greater potential for advancement, but he was not selected. *Id.* On November 14, 2012, he filed an appeal in which he alleged that his nonselection was in violation of USERRA. *Id.* Specifically, the appellant alleged:

The selecting official in this case . . . had made derogatory statements to me concerning my enlisted status in the U.S. Armed Forces. While I was serving as Deputy Protocol Officer to the Chief of Naval Operations, the [selecting official] stated that he could not conceive how I had been a mere Chief Petty Officer in the U.S. Navy. The [selecting official] then became dismissive towards me following his learning of my prior enlisted status.

Id., MSPB Form 185-7 (Continuation Sheet). The appellant further alleged that the selecting official selected a civilian candidate for the Event Forum Project Chief position, even though the appellant was a disabled veteran and more qualified than the selectee. *Id.*

¶3 The administrative judge issued an order advising the appellant of the requirements for establishing jurisdiction over a USERRA appeal and directing him to submit evidence and argument on the issue. IAF, Tab 3. In response, the appellant reiterated his contentions that the deciding official “made statements that established direct evidence of discriminatory animus” and was “dismissive of [the appellant] after learning that he was not a naval officer.” *Id.*, Tab 4 at 4, 5. The appellant further stated that “[i]t appears based on his military status as an enlisted man, this simply precluded [the appellant] from consideration.” *Id.* at 5. Along with his narrative response, the appellant submitted an affidavit in which he averred, inter alia, that the selecting official was aware of his prior military status and had negatively commented on the fact that the appellant had been an enlisted man; that the selecting official was surprised that the appellant held the

position in the civil service that he did based on that enlisted status; and that, after finding out the appellant had been an enlisted man, the selecting official became dismissive of his work. *Id.* at 7.

¶4 The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 5. In its motion, the agency argued, *inter alia*:

Appellant does not allege that he was discriminated against simply because he served in the military. Instead, Appellant alleged that he was discriminated against due to his particular rank within the military. Even if Appellant was discriminated against based upon his rank, such a consideration is not prohibited by USERRA. USERRA prohibits the Agency from discriminating based on military service, not based upon the particulars of that military service.

Id. at 10. In support of its argument, the agency relied on a nonprecedential initial decision, *Roberts v. Department of the Air Force*, MSPB Docket No. SF-3443-06-0138-I-1, Initial Decision (Feb. 27, 2006), mistakenly believing it to be a precedential decision by the full Board. IAF, Tab 5 at 7-8; *see* IAF, Tab 40 at 4.

¶5 The administrative judge initially determined that the appellant had established jurisdiction over his appeal. IAF, Tab 12. However, upon reconsideration of the agency's motion to dismiss, the administrative judge found that "at least some of the arguments raised by the agency in its motion may have merit," and he provided the appellant an opportunity to respond to the agency's motion. IAF, Tab 34. In his response, the appellant argued as follows:

[The appellant] alleges a civilian employee . . . who was less qualified than him and yet was selected [by the selecting official] was chosen because she was not in the military, while [the appellant] was. This is a cognizable USERRA claim.

That [the selecting official] denigrated and shunned [the appellant] based on his prior military status is clear. The fact that he couched his animus in disdain for [the appellant's] enlisted status does not derogate that right under USERRA not to be treated more harshly than a non-veteran, which [the selectee] was.

IAF, Tab 36 at 6.

¶6 Based on the parties’ written submissions, the administrative judge found that the appellant had failed to make nonfrivolous allegations of Board jurisdiction. IAF, Tab 41, Initial Decision (ID). In particular, he found that the appellant’s contention that the selecting official had spoken disparagingly of his prior military rank, even if true, could not be reasonably interpreted as a nonfrivolous allegation that he had lost a benefit of employment due to his membership, application for membership, performance of service, application for service, or obligation to perform duty in the uniformed service. ID at 6; *see* [38 U.S.C. § 4311\(a\)](#). Accordingly, the administrative judge dismissed the appeal without holding the hearing the appellant had requested. ID at 1-2. This petition for review followed. Petition for Review File, Tab 1.

ANALYSIS

¶7 The appellant alleges that the agency violated the nondiscrimination provision of USERRA, which provides, in relevant part, that “[a] person who . . . has performed . . . in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of that . . . performance of service.” [38 U.S.C. § 4311\(a\)](#). Contrary to the initial decision, we find that the appellant is entitled to a hearing on the merits of his claim.

¶8 The Board has adopted, and the Federal Circuit has endorsed, a “liberal approach in determining whether jurisdiction exists under USERRA.” *Yates v. Merit Systems Protection Board*, [145 F.3d 1480](#), 1484 (Fed. Cir. 1998). Under this approach, the relative weakness of the specific factual allegations initially made by an appellant in his USERRA claim should not serve as the basis for dismissing the appeal for lack of jurisdiction; rather, if he fails to develop those allegations, his USERRA claim should be denied on the merits. *Searcy v. Department of Agriculture*, [115 M.S.P.R. 260](#), ¶ 7 (2010). Thus, in order to establish jurisdiction over his USERRA claim, the appellant need only allege that

(1) he served in the military, (2) he was denied initial employment, reemployment, retention in employment, promotion, or a benefit of employment, and (3) the denial was due to his service in the military. *See id.*, ¶¶ 7-8 (finding that, although the appellant’s allegations were vague and lacking in specificity, he established jurisdiction by alleging that the agency was aware of his prior uniformed service and denied him employment in a position because of his prior uniformed service and denied him a benefit of employment when it withdrew funds from his civil service retirement account); *Wilson v. Department of the Army*, [111 M.S.P.R. 54](#), ¶ 10 (2009) (finding that the appellant established jurisdiction by alleging that he was serving in the Army National Guard and was terminated during his probationary period because “agency officials didn’t like the fact” of his service).

¶9 Here, it is undisputed that the appellant is a veteran and was not selected for the Event Forum Project Chief position. The appellant has further alleged that his nonselection was due to his prior military service and that his qualifications were superior to the selectee, who was a nonveteran. That allegation is sufficient to establish jurisdiction under the Board’s liberal pleading standard for USERRA claims. *See Patterson v. Department of the Interior*, [424 F.3d 1151](#), 1161 (Fed. Cir. 2005) (finding that the appellant established jurisdiction by alleging that “the agency’s reason for not selecting him—i.e., that he was not as qualified as the selecting individual—was pretext, as evident from a comparison of his qualifications to those of the selectee, a non-veteran”); *see also Perkins v. U.S. Postal Service*, [85 M.S.P.R. 545](#), 547 (2000) (finding jurisdiction where the appellant alleged that, while he performed well during his first casual appointment, he was not reinstated for a second appointment, although three others who were not veterans were reinstated).

¶10 Furthermore, the Board has recently held that, contrary to the initial decision in *Roberts*, USERRA prohibits discrimination based not only on the fact of military service but also on the particulars of that service. *See McMillan v.*

Department of Justice, [120 M.S.P.R. 1](#), ¶¶ 13-18 (2013) (remanding for consideration of the appellant's claim that the agency denied him a tour extension based in part on his performance of specific military orders that required him to prepare a report and participate in a videoconference concerning agency business). Consequently, our jurisdiction is not defeated by the appellant's claim that the selecting official discriminated against him based specifically on his former status as an enlisted man. Because the appellant has established Board jurisdiction over his USERRA claim, he is entitled to the hearing he requested. *See Kirkendall v. Department of the Army*, [479 F.3d 830](#), 844-46 (Fed. Cir. 2007).

ORDER

¶11 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.